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In the Supreme Court of the United States

OCTOBER TERM, 1985

QUIVIRA MINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether sparsely watered arroyos, which provide subsurface and intermittent surface flows to a tributary of the Rio Grande, are "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, so that pollutant discharges into the arroyos are subject to regulation under the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-408

QUIVIRA MINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 765 F.2d 126. The orders issued on behalf of the Administrator of the Environmental Protection Agency (Pet. App. 17a-20a, 30a-33a) are unreported, as are the earlier initial decisions (Pet. App. 8a-16a, 21a-29a) of the Regional Administrator of the Environmental Protection Agency's Region VI.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1985. The petition for a writ of certiorari was filed on September 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners Quivira Mining Company and Homestake Mining Company of California mine and mill uranium near Grants, New Mexico.[1] In their operations, they pump groundwater out of their mineshafts, use it either in their milling process or for recirculation back into their mines to leach out additional uranium, and eventually dispose of it on the surface (Pet. 2; Pet. App. 8a, 21a).[2] They discharge some of their mineshaft water into Arroyo del Puerto and San Mateo Creek, the channels of which join one another downstream from petitioners' discharge points and continue farther downstream as San Mateo Creek (*id.* at 8a-9a, 22a).

Like many watercourses in the southwest, Arroyo del Puerto and San Mateo Creek are arroyos—gullies created by past water erosion. Although their channels conduct "surface [water] flow only in response to episodic precipitation" (Pet. App. 9a, 22a), petitioners' discharges, "comingled with the discharges of other uranium mining facilities [into the two arroyos], result[] in surface flow in San Mateo Creek to a point approximately 1.3 miles below its junction with Arroyo del Puerto, even in the absence of precipitation" (*id.* at 9a, 23a). On "relatively rare occasions,

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[1]Kerr McGee Nuclear Corporation and United Nuclear Homestake Partners, the predecessors in interest to Quivira and Homestake, respectively, were the original parties during the proceedings conducted by the Environmental Protection Agency (Pet. App. 17a, 30a). However, they were replaced by petitioners in the court of appeals (*id.* at 2a). For simplicity, a reference in this brief to either petitioner also signifies whichever predecessor in interest acted in its stead at any previous time.

[2]Homestake's uranium mill site has been listed by EPA as one of the top-priority sites in the nation containing hazardous substances, due to contamination of groundwater by uranium. 40 C.F.R. Pt. 300, App. B, Group 9, at 739. This listing was made pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9605.

precipitation contributes enough water to the surface flow in San Mateo Creek" to enable the flow to reach Rio San Jose, which feeds Rio Puerto, a tributary of the navigable Rio Grande (*id.* at 10a, 23a-24a; Pet. 4). In addition, water "infiltrating the bed of San Mateo Creek is not 'lost' to the Rio San Jose" (Pet. App. 14a). Instead, at least some of that water "migrates through the shallow alluvium underlying San Mateo Creek to Horace Springs, where it reemerges and flows into the Rio San Jose" (*ibid.*).[3]

b. From its mine and mill at Ambrosia Lake, Quivira discharges 15% of its mineshaft water in Arroyo del Puerto at a point three miles upstream from the arroyo's junction with San Mateo Creek and stores the remaining water in its tailings ponds (Pet. App. 8a-9a). Upstream from Quivira's discharge point by half a mile, approximately 936,000 gallons of mineshaft water, containing radium 226, uranium, selenium, and molybdenum, are discharged each day by Homestake into Arroyo del Puerto (*id.* at 21a-22a). Additionally, Quivira discharges mineshaft water from its Lee Mine into San Mateo Creek at a point upstream from the creek's confluence with Arroyo del Puerto (Pet. 6 n.6; Pet. App. 2a).

c. Originally, petitioners sought National Pollutant Discharge Elimination System (NPDES) permits from EPA. NPDES permits, authorized by Section 402(a) of the Clean Water Act, 33 U.S.C. 1342(a), enable their holders to discharge pollutants under prescribed restrictions. The permits generally adopt the effluent limitations contained in

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[3]This description of flow in the arroyos is taken from the findings of fact made by EPA's Regional Administrator. In the court of appeals, petitioners challenged these findings, but the court held that they were supported by substantial evidence presented at an adjudicatory hearing conducted by EPA (Pet. App. 6a). Although petitioners continue to criticize the evidence (Pet. 5-6 nn.4-5), the question presented by the petition does not involve the sufficiency of the evidence.

regulations issued by EPA under Sections 301 and 304 of the Act, 33 U.S.C. 1311, 1314. The NPDES permit "transform[s] generally applicable effluent limitations * * * into the obligations (including a timetable for compliance) of the individual discharger." *EPA* v. *California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205 (1976).

EPA issued NPDES permits for discharges from Quivira's Lee Mine and Ambrosia Lake mill and from Homestake's mill (Pet. App. 2a), but petitioners later concluded that they were exempt from the Act's permit requirements. They contended that San Mateo Creek, into which their discharges flowed, is not a "water of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and, therefore, their discharges into the creek were beyond the Act's regulatory coverage and required no NPDES permits whatever.[4]

2. In 1978, petitioners obtained an evidentiary hearing before an administrative law judge to present their argument that EPA lacked authority to regulate their

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[4]The point into which a pollutant is discharged determines the regulatory coverage of the Clean Water Act. Section 402(a) of the Act, 33 U.S.C. 1342(a), requires dischargers to obtain an NPDES permit. In the absence of an NPDES permit, the "discharge of any pollutant" is generally forbidden by Section 301(a) of the Act, 33 U.S.C. 1311(a), except in compliance with other specified provisions of the Act. But the "discharge of a pollutant" is defined in Section 502(12), 33 U.S.C. 1362(12), to mean "any addition of any pollutant to navigable waters * * *." "Navigable waters," in turn, are defined in Section 502(7), 33 U.S.C. 1362(7), as "the waters of the United States, including the territorial seas."

In adopting this definition of "navigable waters," Congress intended the phrase to be read broadly. In the words of the Conference Committee (S. Conf. Rep. 92-1236, 92d Cong., 2d Sess. 144 (1972)):

> The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

discharges.[5] In March 1981, EPA's Regional Administrator issued two separate initial decisions—one for each petitioner—but the text of each was virtually identical (Pet. App. 8a-16a, 21a-29a). The Regional Administrator concluded that Arroyo del Puerto, as tributary both to the Rio Grande, a navigable waterway, and to San Mateo Creek, a stream affecting interstate commerce, "is [itself] capable of affecting interstate commerce" (*id.* at 11a, 24a) and qualifies as a "navigable water" under the Clean Water Act (*ibid.*).

As previously explained (see pages 2-3 & note 3, *supra*), the Regional Administrator made factual findings that, on "relatively rare" occasions, estimated by one area resident to occur on an average of once every five years, precipitation produced sufficient flow to carry the waters of Arroyo del Puerto and San Mateo Creek 23 miles downstream to Rio San Jose (Pet. App. 10a, 23a). Typically, however, surface flow attributable to discharges diminishes at a point on San Mateo Creek 1.3 miles below its junction with Arroyo del Puerto, where it begins to evaporate or enters an underground aquifer to reemerge at Horace Springs and enter the Rio San Jose (*id.* at 9a-10a, 22a-23a).[6] On "various occasions," precipitation would carry the flow to all or part

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[5]Homestake agreed that its claim could be resolved on the record developed at the Quivira hearing (Pet. 4). That hearing addressed Quivira's discharges from the Ambrosia Lake mill into Arroyo del Puerto, but it did not address Quivira's discharges from the Lee Mine into San Mateo Creek.

Quivira's request for an evidentiary hearing to review its Lee Mine permit was denied by EPA's Regional Administrator (Pet. 6 n.6; Pet. App. 34a-35a) on the ground that the issue had been resolved in the EPA proceeding concerning Quivira's discharges into Arroyo del Puerto. In this Court, petitioners do not challenge EPA's refusal to hold a separate hearing for the Lee Mine permit.

[6]The travel time for this underground flow to reemerge at Horace Springs was found to range from 154 to 1,000 years (Pet. App. 10a, 23a).

of the Bert Roundy Ranch, until it was diverted by spreader dams used on the ranch or obstructed by a tailings pile that Homestake had placed in San Mateo Creek below the ranch (*id.* at 10a-11a, 22a-24a). On the Roundy Ranch, some of the cattle, which feed on grasses irrigated by San Mateo Creek water or which drink from the Creek or from wells to its underlying aquifer (*id.* at 11a, 24a), were consigned "for auction in the interstate cattle market" (*ibid.*). From these findings, the Regional Administrator concluded that "San Mateo Creek and its tributary, Arroyo del Puerto, are 'navigable waters,' " which, under the mandate of the Clean Water Act, must be protected by EPA (*id.* at 16a, 29a).

Petitioners asked the Administrator to review the Regional Administrator's decisions; in August 1983, further agency review was denied because the Regional Administrator's findings and conclusions could not "be termed 'clearly erroneous' for purposes of deciding whether or not to accept review" (*id.* at 19a, 32a).

3. Petitioners sought judicial review in the United States Court of Appeals for the Tenth Circuit.[7] The court of appeals affirmed the agency's decisions (Pet. App. 1a-7a). The court of appeals refused petitioners' invitation to "engage in independent or de novo review without giving weight to the determination of the Administrator" (*id.* at 3a). Instead, the court reviewed EPA's decisions under the "substantial evidence" test of the Administrative Procedure Act, 5 U.S.C. 706(2)(E) (Pet. App. 3a).[8] Under this test, the

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[7]Section 509(b)(1) of the Clean Water Act, 33 U.S.C. 1369(b)(1), confers jurisdiction on the courts of appeals to review various EPA determinations, including EPA's actions "in issuing or denying any [NPDES] permit under" Section 402 of the Act, 33 U.S.C. 1342.

[8]In this Court, petitioners do not directly challenge the standard of review employed by the court of appeals.

court of appeals held that substantial evidence supported EPA's findings (*id.* at 6a-7a)

> that during times of intense rainfall, there can be a surface connection between the Arroyo del Puerto, San Mateo Creek and navigable-in-fact streams. Further, the record supports the finding that both the Arroyo del Puerto and San Mateo Creek flow for a period after the time of discharge of pollutants into the waters. Further, the flow continues regularly through underground acquifers [*sic*] fed by the surface flow of the San Mateo Creek and Arroyo del Puerto into navigable-in-fact streams. The court finds that the impact on interstate commerce is sufficient enough to satisfy the commerce clause. And, as noted above, it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible under the commerce clause.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[9] Accordingly, further review is not warranted.

On facts no longer directly challenged by petitioners, the court of appeals sustained a determination by the Environmental Protection Agency that two sparsely watered arroyos in the arid southwest, which conduct subsurface and intermittent surface flows into tributaries of the navigable Rio Grande, and are used by the interstate cattle industry,

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[9]Petitioners' primary contention (Pet. 10-11) is that the decision below conflicts with *United States* v. *Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984). That contention, which we believe was without merit in any event, no longer warrants consideration in light of this Court's reversal of the Sixth Circuit's decision (No. 84-701 (Dec. 4, 1985)).

qualify as "waters of the United States." Hence, the arroyos constitute "navigable waters" as broadly defined by Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and discharges of pollutants into the arroyos require NPDES permits under Section 402(a), 33 U.S.C. 1342(a). This result comports with a decision rendered more than 10 years ago in *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). There, in a criminal prosecution, the court refused to dismiss an information alleging that discharges of pollutants were made into an arroyo in violation of Sections 301(a) and 309(c)(1) of the Act, 33 U.S.C. 1311(a), 1319(c)(1). The court held that the Clean Water Act controlled pollutant discharges into "*any waterway,* including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters" (391 F. Supp. at 1187 (emphasis in original)). The court explained that (*ibid.*)

> a legal definition of "navigable waters" or "waters of the United States" within the scope of the [Clean Water] Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.[10]

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[10] *Phelps Dodge* also held that, for purposes of a criminal prosecution, the statutory term "waters of the United States" was not void for vagueness on due process grounds (391 F. Supp. at 1187-1188). Accord *United States* v. *Oxford Royal Mushroom Products,* 487 F. Supp. 852, 854-855 (E.D. Pa. 1980). The same conclusion was reached in civil enforcement proceedings under the Clean Water Act. *United States* v. *Tull,* 769 F.2d 182, 186 (4th Cir. 1985).

Phelps Dodge has been cited with approval in *Avoyelles Sportsmen's League, Inc.* v. *Marsh,* 715 F.2d 897, 915 n.32, 917 (5th Cir. 1983); and *United States* v. *Huebner,* 752 F.2d 1235, 1239 n.6 (7th Cir. 1985), cert. denied, No. 84-1613 (Oct. 7, 1985). There have been no contrary decisions holding that discharges into arroyos are beyond the statutory reach of the Clean Water Act or the constitutional reach of the Commerce Clause. Indeed, this Court has expressed its agreement "with the lower courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that *may* have effects in more than one State." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 282 (1981) (emphasis added). See also *United States* v. *Tull,* 769 F.2d 182, 185 (4th Cir. 1985); *United States* v. *Byrd,* 609 F.2d 1204, 1209-1210 (7th Cir. 1979). And, contrary to petitioners' contention (Pet. 10-11 & n.10), no case has held that activities having a "connection to water affecting interstate commerce * * * as attenuated as that presented here" are beyond the constitutional reach of the Clean Water Act.[11]

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[11]Indeed, the cases cited by petitioners (Pet. 10-11 n.10) indicate that the effect on interstate commerce may well be tenuous yet still be sufficient to support jurisdiction under the Clean Water Act. Thus, discharges into remote tributaries of navigable rivers have been held to be within the reach of the Act, even when there was only "a small flow of water" in the remote tributary and no evidence of flows in other streams that fed into the river (*United States* v. *Texas Pipe Line Co.,* 611 F.2d 345, 347 (10th Cir. 1979)), or when proof was totally lacking that the discharged pollutant actually "reached and polluted the navigable river" (*United States* v. *Ashland Oil & Transportation Co.,* 504 F.2d 1317, 1329 (6th Cir. 1974)). Likewise, the courts of appeals have held that waters regulated under the Act include a lake entirely within a single state, unconnected to waters outside the state (*Utah* v. *Marsh,* 740 F.2d 799, 801, 803-804 (10th Cir. 1984)), wetlands adjacent to such a lake (*United States* v. *Byrd,* 609 F.2d at 1208-1211), and a nonnavigable creek in a single county that fed two downstream reservoirs used for

In addition to *Phelps Dodge*, the decision below is strongly supported by *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-1329 (6th Cir. 1974). There, the court held that the coverage of the Clean Water Act was broad enough to encompass the waters of a remote, nonnavigable tributary upstream from a river that was navigable in fact. The Sixth Circuit also ruled that the government need not prove that oil, discharged into the remote tributary, "in fact * * * reached and polluted the navigable river" (504 F.2d at 1329). Noting that such proof is impossible "in many if not all cases" (*ibid.*), and that "[d]rops (or barrels) of oil carry no fingerprints" (*ibid.*), the court construed the Act as dispensing with any such requirement.[12] The Sixth Circuit noted that Congress was

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agricultural irrigation and recreation (*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374-375 (10th Cir. 1979)). See also *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1186 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Holland*, 373 F. Supp. 665, 673-676 (M.D. Fla. 1974).

Jurisdiction under the Clean Water Act on the facts of the instant cases is thus fully consistent with the cases cited by petitioners. As mentioned previously, the arroyos are used by the interstate cattle industry and feed a navigable river. Such interstate impact "is all that is necessary under the [Clean Water] Act" (*Earth Sciences*, 599 F.2d at 375), and, for that matter, under the Commerce Clause. Even purely intrastate activity, combined with like conduct of others, may affect interstate commerce. Moreover, "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277. And the impact of isolated acts, when "taken together with that of many others similarly situated, is far from trivial." *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942).

[12]The court in *Ashland* cited the Senate Report on the 1972 amendments to the Clean Water Act, which stated (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)):

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

concerned with the pollution of nonnavigable tributaries as well as navigable streams and concluded that "it is incontestable that substantial pollution of one not only may but very probably will affect the other" (*ibid.*). This analysis clearly comports with the decision below and with the holding of *Phelps Dodge,* 391 F. Supp. at 1187, that "normally dry arroyos" are "waters of the United States" if their flowage "could reasonably end up" in rivers or tributaries.[13]

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[13]Petitioners also challenge (Pet. 11 n.10) the alternative basis for the decision below, which relied on groundwater flow connecting the arroyos with "navigable-in-fact" streams (Pet. App. 6a-7a). Petitioners cite (Pet. 11 n.10) two decisions that they claim rejected "EPA's attempts to regulate discharges to groundwater." The two decisions —*Exxon Corp.* v. *Train,* 554 F.2d 1310 (5th Cir. 1977), and *United States* v. *GAF Corp.,* 389 F. Supp. 1379 (S.D. Tex. 1975) — cannot be characterized so broadly. Both cases involved the injection of industrial wastewater directly from the surface into subsurface deep wells, whereas the discharges involved here were made into surface waters in the arroyos. Both groundwater cases stand for the proposition that direct deepwell injection is not a "discharge" into "waters of the United States" within the meaning of the Clean Water Act. But they are not authority for narrowing the Act's coverage of discharges into *surface waters* that feed subsurface aquifers, which, in turn, feed other surface waters. Indeed, the district court in *GAF Corp.,* 389 F. Supp. at 1383, limited its exclusion of groundwater from regulated waters under the Act to those "underground waters which have not been alleged to flow into or otherwise affect surface waters." EPA's findings in the present cases, however, are to the effect that the underground waters do indeed flow into surface waters (Pet. App. 10a, 23a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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